

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NEW BERLIN EDUCATION ASSOCIATION, Complainant,

vs.

SCHOOL DISTRICT OF NEW BERLIN, Respondent.

Case 30
No. 64067
MP-4093

Decision No. 31243-A

Appearances:

Rebecca Ferber Osborn, Wisconsin Education Association Council, 13805 West Burleigh Road, Brookfield, Wisconsin 53005-3058, appearing on behalf of the School District of New Berlin.

Michael Aldana, Quarles & Brady, LLP, 411 East Wisconsin Avenue, Suite 2040, Milwaukee, Wisconsin 53202-4497, appearing on behalf of the School District of New Berlin.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

Daniel Nielsen, Examiner: On October 13, 2004, the above-named Complainant, New Berlin Education Association, filed with the Commission a complaint, alleging that the above-named Respondent, School District of New Berlin, violated the provisions of Ch. 111.70, MERA, by individually bargaining with members of the bargaining unit, unilaterally changing the hours and days of parent-teacher conferences, and retaliating against bargaining unit members Rose Zarske and Joe Hanser for the exercise of protected rights.

Hearings were held in New Berlin, Wisconsin, on March 11 and April 18, 2005, at which time the parties presented such testimony, exhibits, other evidence and arguments as were relevant. The hearing were transcribed and the second transcript was received on May 8, 2005. The parties thereafter submitted briefs and reply briefs. Briefing was completed on July 21, 2005, whereupon the record was closed.

No. 31243-A

On the basis of the record evidence, the arguments of the parties, and the record as a whole, the Examiner makes and issues the following, Findings of Fact.

FINDINGS OF FACT

1. The School District of New Berlin (hereinafter referred to as either the District or the Respondent) is a municipal employer, which provides general educational services to children in the vicinity of New Berlin in southeastern Waukesha County. The District's business address is 4333 South Sunny Slope Road, New Berlin, Wisconsin 53151. At all time relevant to this complaint, Randy Hawley was the District's Human Resources Director, and Susan Bechard was the Principal of Prospect Hill Elementary School.

2. The New Berlin Education Association (hereinafter referred to as either the Association or the Complainant) is a labor organization and is the exclusive bargaining representative for the District's teachers. The President of the Association is Sandy Theis, and Joe Hanser is the First Vice President and grievance chair. The Association is affiliated with the Lakewood UniServ Council and the Wisconsin Education Association Council. Contract administration and bargaining services for the Association are provided through Lakewood UniServ Council, 13805 West Burleigh Road, Brookfield, Wisconsin 53005. At all time relevant to this complaint, the UniServ Director providing services to the Association was Steve Cupery.

A. FINDINGS OF FACT PRINCIPALLY RELATED TO THE SCHEDULING OF PARENT-TEACHER CONFERENCES

3. The District and the Association have been parties to a series of collective bargaining agreements. The last settled contract was the 1999-2001 agreement, and the parties were, at the time of the events relevant to this complaint, in a contract hiatus. Among the provisions of the expired agreement were Articles IV (Salaries and Extra Pay Schedule), V (Conditions of Employment) and X (Waiver):

- a. Article IV provides, in relevant part, that the School Year will include three parent-teacher conference days, two in the first semester and one in the second semester. It further provides for a Calendar Study Committee to develop the school calendar one year in advance.
- b. Article V provides, in relevant part, that the work day for elementary school teachers is 7.5 hours, including a 30 minute duty free lunch.
- c. Article X provides a system for formally waiving the provisions of the collective bargaining agreement:

A waiver is a written exception to a specific term(s) of this Contract; it has status equal to the term(s) that the waiver replaces. A waiver shall occur if approved by (a) a building principal, (b) a vote of 67% of the total teaching staff in that building at the time of the vote and (3) by the Association.

A waiver must specify the provisions(s) of the Contract to be waived, and the nature and duration of the waiver. A waiver shall not constitute past practice or establish precedent for future bargaining, for grievance processing or for any other purpose.

Except to the extent waived pursuant to the paragraphs above, the collective bargaining agreement will remain in full force and effect, and have full application to the employees who are affected by any site-based decision making arrangement.

No employee will be excluded from the bargaining unit as a supervisory or managerial employee, within the meaning of Section 111.70, Wisconsin Statutes, by reason of his or her participation in a site-based decision making arrangement.

Except as otherwise expressly provided in this Article, the Association reserves the rights it may have under law or the collective bargaining agreement, to bargain with the Board before any action is taken that affects the working conditions of any employee.

. . .

4. In 2001 and 2002, the schedule for parent-teacher conferences at Prospect Hill Elementary School was to have three evenings from 4:00 to 8:00 devoted to conferences in the Fall semester, with two compensatory days off, and two evenings in the Spring semester, with one compensatory day off. Conferences are scheduled for 20 minutes, with ten minute breaks in between. Teachers were expected to schedule eight hours of conference time with parents across the three nights in the Fall.

5. The agreed upon calendar for 2003-2004 reserved November 12 and 13, and March 3 and 4 for parent-teacher conference days.

6. In the Fall of 2003, Prospect Hill Elementary School Principal Susan Bechard proposed to her staff that the Fall semester conferences be changed to spread the meetings over three days. The staff agreed through a hand vote, and a waiver was prepared by elementary teacher Rose Zarske, a first year building representative for the Association. Zarske's initial draft showed the conferences being scheduled from 4:00 to 8:00 p.m. as they had been in the prior years. Bechard asked her to change it to 4:00 to 8:15 each night, and Zarske agreed. There was no discussion at that time of the schedule for the Spring conferences.

7. The waiver took the form of a memo to Human Resources Director Randy Hawley and Association President Sandy Theis, from Bechard, Zarske and Colleen Muench, the other Association building representative at Prospect Hill:

Subject: Parent teacher conferences amendment

Date: October 13, 2003

Attn: Randy Hawley, Sandy Theis

Our staff decided to change our parent teacher conferences to the following dates:

November 6 (4:00-8:15)

November 11 (4:00-8:15)

November 12 (4:00-8:15)

Teachers will schedule their 8 hours during this time and submit a schedule to the principal. We polled the staff and the staff voted to do this.

/s/ Susan Bechard
Principal

/s/ Colleen Muench
Building Rep

/s/ Rose Zarske
Building Rep

8. Bechard met with Randy Hawley to discuss the waiver on October 16th. In the course of their discussion, Hawley noted that if the teachers only scheduled twelve and three quarter hours of conferences during the three days, they would be working less than their normal fourteen hour obligation for conferences. Hawley made a notation on the bottom of the waiver "Will add the hours in the Spring conf. to get more time for that." Neither Hawley nor Bechard provided a copy of the waiver form with the additional notation to any representative of the Association.

9. At a staff meeting on January 20, 2004, Bechard informed the Prospect Hill teachers that because they had only worked twelve and $\frac{3}{4}$ hours during the Fall conferences, they would need $9\frac{3}{4}$ hours of meeting time in the Spring to total twenty two and a half hours for conferences across the school year. She presented them with a memo proposing conferences on February 26 from 4-7:00 p.m., March 2 from 4-7:00 p.m., and March 4, from 4-7:45 p.m. The memo included the notation:

[We used 12.75 hours in the fall. We have three total comp days for the school year, Nov. 13, 14 and March 5. We need 9.45 (sic) hours to complete the 7.5 hours/day X 3 days of 22.5 hours.]

10. That night, Zarske attended an Association meeting. She raised the issue of what Bechard had said about conference scheduling for the Spring. Association President Sandy Theis advised her that the contract called for 14 hours for conferences in the Fall and 7 hours in the Spring, and that she should not agree to more than 7 hours for the Spring conferences.

11. On the morning of January 21, Zarske and Muench met with Bechard and discussed several issues related to hours. Zarske advised Bechard that the Association had objected to scheduling more than seven hours for the Spring conferences. Bechard replied that she was going to hold the teachers to the hours they owed the District, and showed them the copy of the waiver agreement from the Fall, with the notation made by Hawley.

12. At a staff meeting on January 30, Bechard again raised the issue of Spring conferences. She explained to the staff that they received twenty one hours of comp time each year for conferences, and that they should not expect to work less than twenty-one hours in return. By this meeting, Bechard had realized that the 7.5 hour per day calculation she had been using included a thirty minute duty free lunch, and she amended her position on hours owed to 8.25 hours.

13. On February 4, the Prospect Hill staff met to discuss the scheduling of Spring conferences. Zarske invited Sandy Theis to attend the meeting, because she felt Theis was more familiar with the issues than she was. Bechard encountered Theis on her way into the meeting and advised her that the meeting was only for elementary school staff. Theis waited outside the meeting.

14. After the meeting, Theis and Bechard spoke about the scheduling issue. Theis attempted to persuade Bechard to drop it, but Bechard declined. Theis told Bechard that if a waiver came to her with more than seven hours for Spring conferences, she would refuse to approve it.

15. On February 11 Bechard sent a ballot out to faculty with two options for scheduling Spring conferences. Option "A" featured three days. March 4th would be used for conferences with families having multiple students and families with special education students, and would be a longer evening. March 2 and 3rd would be used for flexible scheduling of sessions, and would be shorter evenings. Option "B" would feature only two days, March 2 and 4th, with an equal number of hours each night. Neither option listed the hours of the proposed conference sessions. There was no third option listed for "No waiver" of the contract. Neither option received the required 67% of the vote.

16. On February 17 Bechard sent another ballot out to faculty with two options for scheduling Spring conferences. Option "A" was "No waiver" of the contract, with conferences being held on March 3 and 4th per the school calendar. Option "B" was for most conferences to be held on March 3rd and 4th, and scheduled before or after school, during lunch hour, or one a different day if that was more convenient for the families. Option "B" called for scheduling on different days, for sixth grade and special education staff, because of a Middle School orientation scheduled for March 3rd. The ballot asked staff to indicate their preference "regardless of whether 7 or 8.25 hours" of work would be scheduled across the conference days.

17. The ballots were counted by the office staff. Unlike past years, no representative of the Association was involved in counting the votes. The announced totals were 6 for no waiver, 17 for the flexible option, and 1 no opinion. Bechard announced that the flexible option would be employed, and the teachers would be expected to work 8.25 hours across the two days. No waiver was prepared for the Spring conference, and the Association did not agree to a variation from the negotiated calendar.

18. A grievance was filed on behalf of the Association and all affected employees, protesting the change in the school calendar and the number of work hours expected of employees for the Spring conferences. The grievance further protested that past practice was not followed in the method of counting ballots, since no the Union was not included in that process. The grievance requested that the District cease and desist individual bargaining, and withdraw the proposed schedule. The grievance finally sought pay for the additional 1.25 hours of work, if the schedule was not withdrawn and the teachers were required to work the time.

19. The grievance was denied. The District alleged that the process followed was the same as in past years.

20. The Spring conferences were held on March 2, 3 and 4th, per the staff vote. Staff were not monitored to insure that they worked the full 8.25 hours that Bechard had told them they would be required to work.

B. FINDINGS OF FACT PRINCIPALLY RELATED TO THE TREATMENT OF ROSE ZARKE

21. On April 27, a staff meeting was held at Prospect Hill. Bechard gave a presentation to the staff on several topics. In the course of the presentation, Zarske was talking to another staff member, and Bechard asked her to be quiet. Bechard had done the same to other teachers in the past during staff meetings.

22. At the beginning of the 2003-2004 school year, staff had been trained that they should have epi-pens and walkie-talkies with them when on the playground, in case of emergencies. At the end of September, an e-mail was sent to all staff, reminding them of this responsibility. On April 28, Bechard was advised by the health center staff that several students had suffered playground injuries during the day while Zarske was the teacher supervising the playground, and that Zarske had not checked out either a walkie-talkie or an epi-pen before going out for recess. She sent Zarske an e-mail about this:

Dear Rose,

It has come to my attention that a few kids came in from morning recess with a bloody nose or a bleeding finger. We had no walkie-talkie call from you, who was the teacher listed on the duty schedule. Then I discovered you didn't take a

walkie-talkie out from the office or the bag with the epi-pen. These actions are unacceptable and dangerous. Please follow the correct procedures so that our students are safe.

Susan

On May 12th, Bechard sent an e-mail to Zarske and three other teachers, reminding them to take a walkie-talkie and epi-pen kit whenever they went outside with their students. A reminder was also included in the general staff bulletin for April 26 through May 14. Zarske was not assessed any discipline for failing to take a walkie-talkie or epi-pen with her outside.

23. At the end of the day on April 28th, Bechard sent Zarske an e-mail saying she believed she had not yet submitted her third quarter grades. Zarske responded that she was sure that she had, but that she would resubmit a copy of the spreadsheet.

24. On April 30th, Jamie Yoblin, the Tech Assistant at Prospect Hill, sent out an e-mail, advising staff of the schedule for the computer lab. She noted that Zarske had reserved an hour on three days, May 4, 5 and 7, for a first grade project. Bechard replied that she had concerns about first graders spending that much time in the computer lab. Zarske sent an e-mail explaining that it was a one time project, not a regular schedule. Bechard responded that the two of them needed to talk, because she was concerned about the amount of time Zarske was spending on “extras” versus time needed for reading instruction for the first graders. She suggested that they meet. They agreed to meet on May 4. Bechard advised Zarske she would be available until 4:00 that day.

25. Zarske contacted Association grievance chair Joe Hanser and asked him to meet with her and accompany her to the meeting with Bechard, because – in light of the Spring conference dispute - she was becoming concerned at the volume of contact she and Bechard had been having over the past week, and feared that she might be disciplined.

26. At the end of the day on May 4th, at 3:45, Bechard had Zarske paged because she wanted to meet with her before a 4:00 commitment to help make gifts for parents who volunteered at the school. She did not respond to the first page, so Bechard had her paged again. Zarske contacted the office and said she was finishing something in her classroom and would be right up. Hanser came to the office, and told Bechard he was there for the meeting with Zarske. She asked him shy, and he said Zarske was concerned that the meeting might lead to discipline. She assured him that was not the case, and he left.

27. Hanser encountered Zarske in the hall, and walked with her back to Bechard’s office. When they arrived at 4:05 p.m., the secretary told them that Bechard was not there she had had to leave to go upstairs for her 4:00 meeting. Hanser walked upstairs and saw Bechard engaged in a group activity, so he did not interrupt her. He left a note for her:

Susan

As we discussed upon my arrival since you assured me that your meeting with Rose was to discuss the use of PowerPoint and in no way would lead to disciplinary action against Rose Zarske, I, as we agreed had a short meeting with Rose. At 4:05 Rose went to meet with you and informed me that she had been informed by Maggie that the meeting with Rose is now cancelled for today, so I advised Rose to go home.

Joe Hanser, 1st VP NBEA

28. The next day, May 5th, Bechard sent an e-mail to Zarske, expressing disappointment at the preceding afternoon's events:

Dear Rose,

I was disappointed that you left me waiting for you for 15 minutes yesterday when we were to meet right after school. (3:45) Maggie called over the intercom and into your room several times. You finally then called Maggie back at around 3:55 saying that you had to "do a few things," while I was still waiting for you to show up. I was also quite surprised when Joe Hanser came at 4 PM, and he told me he was here for the meeting with you and me, since you never informed me that he was coming to our meeting about PowerPoint. I told Joe, then, that we wouldn't be meeting Tuesday since I had no district staff with me. I then went upstairs to the PH staff activity which I had told you about when we set up our 3:45 PM meeting. Maggie informed you of that, I believe, when you finally came to the office after 4 PM. Your behavior was rude, to say the least, and wasteful of time for me and for Joe. It reminded me of your rude behavior at last week's staff meeting. You and I still need to meet before you proceed with having first graders doing PowerPoint. We also need a follow-up conference to the classroom observations. In addition, I have some visitations, as you and I had discussed earlier in the year. If you feel you need representation for these meetings, then please let me know ahead of time so I can do the same. That is always your option.

Susan

29. Bechard and Zarske did not ultimately meet about the scheduling of extras for first graders. Zarske cancelled the extra computer lab sessions for her students in the week of May 3rd. Bechard arranged for Zarske to observe another teacher's reading instruction technique, and followed up in the following school year to review how much time was reserved for reading. Zarske did not receive any discipline as a result of the May 4th meeting or her plan to have her students work on PowerPoint.

30. Zarske scheduled a field trip for her students during the last week of school. On May 17th, Bechard told her the trip would not be approved, since the first graders had already had the permitted four field trips for the year. Bechard was also concerned that the field strip was scheduled adjacent to the annual “Brag Breakfast” where parents were invited into the school. Zarske told her she had previously approved the trip, and that she believed one of the trips that year was not usually counted against the four trip limit. Bechard told her to reschedule the trip for the following year, and to blame her if the parents complained.

31. The elementary school decorates around the time of holidays, but seeks to do so without reflecting any religious themes. In the Fall of 2004, Bechard spoke with Zarske about the Harvest Party decorations in her room, which included some that directly reflected Halloween, including depictions of witches. Zarske explained that a parent had handled the decorations, and Bechard reminded her that it was her responsibility. She did not direct Bechard to change anything, nor did she impose any discipline on her.

32. In the Fall of 2004, Bechard asked Zarske why she was working on state maps in social studies since that was part of the 4th grade curriculum and Zarske was assigned to 2nd grade that year.

33. In the Fall of 2004, Bechard spoke with Zarske about her guided reading curriculum and asked her to devote more time to reading and writing instruction.

34. In the Fall of 2004, Bechard asked Zarske about the procedures she had followed to arrange a substitute teacher, since the substitute’s name was not transmitted to the administration.

35. In the Fall of 2004, Zarske had seen some surplus chairs and had a custodian bring some of them into her room to replace worn chairs. Bechard had had the chairs brought in from another school, and planned to use them in an adjacent room. She had the chairs removed.

36. In the Fall of 2004, one of Zarske’s students had a gluten allergy, and thus the student’s desk had to be wiped down regularly with Clorox wipes. Zarske asked for some wipes, and Bechard told her to secure them herself, since she had waited to the last minute to make the request.

37. Bechard completed her evaluation of Zarske’s performance for the 2003-2004 school year in June 2004. She rated Zarske as “Meets expectations” in each area. The evaluation characterized Zarske as “hard-working, creative, and energetic” and praised her work with students, teachers and parents. Bechard stated that “I greatly appreciate Rose’s contributions to our school.”

38. Zarske did not receive any discipline for any of the events described in Findings of Fact 3 through 36.

**C. FINDINGS OF FACT PRINCIPALLY RELATED TO THE
ACTIONS OF RANDY HAWLEY**

39. On Tuesday, April 27, Association Second Vice President Diane Lazewski went to Randy Hawley's office to discuss teacher reassignments for the coming year. He was able to address her concerns, and she thanked him for trying to retain as many teachers as possible for the next school year. Hawley told Lazewski that the District and the Association would be able to settle more issues without having to use the grievance process if it were not for UniServ Director Steve Cupery's tendency to file worthless grievances. Hawley told her that the Association had a choice of UniServ Directors and that he could help put her in touch with District where the teachers had replaced Cupery. Lazewski suggested to Hawley that his ego might be the problem in dealing with Cupery, and Hawley conceded that perhaps the problem was that both he and Cupery were egomaniacs. Hawley concluded by telling her that the board was not willing to proceed with negotiations over the contract while they were tied up in arbitration over the prior contract, but if that arbitration could be settled, the negotiations could proceed.

40. Lazewski mentioned the conversation with Hawley to Cupery, and Cupery asked her to write her recollection of the exchange and send it to him. On Friday, April 30th she sent Cupery an e-mail relating the discussion.

41. On the evening of May 5th, Hanser sent an e-mail to Bechard, Randy Hawley and Zarske, responding to Bechard's e-mail to Zarske and relating his version of events surrounding the aborted meeting between Zarske and Bechard. He differed from Bechard in that he claimed to have told her he would need to meet briefly with Zarske, and that she would then come to the office. His e-mail concluded:

Reading the last paragraph of this e-mail from Susan, I can only conclude that the tone is harsh, the resurrection" of the undefined "rude behavior" referred to would seem to indicate that further discipline could result from the staff meeting issue. In conclusion, it would seem to me that my presence in the cancelled meeting has caused Susan a certain amount of discomfort. If the meeting were intended to be as Susan characterized in our short meeting in her office, this discomfort seems out of proportion. Perhaps something else is at work here. Let's all remember Weingarten. Among other things, an employee cannot be disciplined for insisting upon their rights. So I would suggest that Susan be careful so as not to act in a way which could be construed to be punitive towards Rose for my presence at Prospect Hill yesterday. Finally. Randy, perhaps we need to sit down, you, me, Susan, and talk about conducting business in a businesslike manner, so that these misunderstandings do not occur in the future.

Joe

42. Bechard replied the next day, May 6th, denying that she had said she would still meet with Zarske that afternoon, and explaining that her disappointment with Zarske centered on her not having told her that Hanser would be at the meeting, and at having kept her waiting. She concluded with the observation that "Life need not be this complicated." Hanser replied that afternoon:

I agree. I can't believe that life need be this complicated either. I'm not going to argue about the contents of our conversation. I know what we agreed to (that I would have a conversation with Rose and that she would then be down shortly to have the meeting with you). I'm standing behind my earlier statement. Frankly, I'm somewhat miffed that what you tell me in private you now deny in public. I'm the type of person who is willing to stand behind statements I make, even without corroborating witnesses. Sometimes I forget that I'm dealing with people who have less integrity.

This is the last time I intend to discuss this via E-mail. Future discussions will need to be face-to-face. I really don't have the time to spend on this issue, but when my integrity is impugned I tend to take it rather personally.

Joe

43. Hanser's response prompted a reply from Bechard, and a memo from Randy Hawley, both on May 7th. Bechard's reply read:

Perhaps you didn't hear me correctly. I said that Rose and I would still need to meet, but that we wouldn't be meeting "today." I had other scheduled obligations which is why we were to meet right after school for this "short" meeting. You appear to be projecting too many of your own agendas onto this. You certainly have nerve to speak of my integrity.

Hawley's reply was in the form of a memo attached to an e-mail, directing Hanser to contact his office to schedule a meeting about the e-mail exchange with Bechard:

I agree with your comment that we should meet to "talk about conducting business in a businesslike manner". Therefore I am asking you to provide me with times and dates you are available to meet with Mrs. Bechard and me during the week of May 10, 2004. I am available Tuesday, Wednesday or Friday after 3:30 p.m. I am also advising you that you have the right to be accompanied by an association representative, as this meeting could result in disciplinary action.

Please send dates and times to me no later than noon on Monday, May 10, 2004.

44. Hanser responded with an e-mail to Hawley asking him to address any further communications to Steve Cupery, the UniServ Director, who would serve as his Union representative. He also directed another e-mail to Bechard, again questioning her version of events and her integrity:

Susan, I distinctly remember telling you that I'd have a short meeting with Rose and she'd be down shortly. You agreed to this. To me, when someone tells me something and then claims that they never said that, it becomes an integrity issue as far as I'm concerned. I have no agendas in this matter. I simply came to a meeting at a member's request. Upon my arrival you were surprised that I was there. We had a short meeting at my request. It was determined that my presence was not needed. I told you that I'd have a short meeting with Rose and that she'd be down to meet with you shortly. You agreed. End of story until you claimed you never agreed to what we agreed to. I don't believe in doing business like that. It's counterproductive. But either way, We can spend useless energy continuing a dispute that clearly is going nowhere and is harming what I always considered a positive relationship, or we can just move on. After all, we're both going to be around for a while, and there are certainly other issues which we'll have to work together on in the future. Joe

45. At the end of the day on the 7th, Steve Cupery sent Hawley an e-mail advising Hawley that he was Hanser's representative, and that the two were available to meet on Friday, May 14 at 3:30 p.m. He asked Hawley to provide information about what it was that might lead to discipline for Hanser. Hawley replied on Monday, May 10th that Bechard was not available for a meeting after school on Friday. The two had further e-mail exchanges on May 14th in an effort to schedule a meeting. Hawley advised Cupery that Hanser could give him the background of the meeting, and that he wanted Hanser to communicate directly with him about scheduling, rather than going through Cupery:

Joe is to work directly through me on this.

It is his right to have a union rep present, but he does not have the right to abdicate his responsibility for his behavior and responsibility, which includes communicating with administration.

Joe also knows that this is about. He can tell you as well as I can.

Cupery replied that he was acting as Hanser's representative and wanted to hear from Hawley what the potential discipline might concern. He told Hawley that he and Hanser were available to meet on Friday, May 21, and asked Hawley to let him know if he was refusing to deal with him as the Union's representative. Hawley replied:

I'm not trying to make a big deal out of all this. Joe's refusal to communicate with me has only served to complicate the issue. Joe has been given specific

instructions to notify me before 4:00 p.m. today as to his availability for Monday or Tuesday. His refusal to do so would be considered insubordinate..

Cupery replied that Hanser was not refusing to communicate, but that scheduling needed to be coordinated with Cupery's calendar. He again offered a May 21st meeting, and asked what the nature of the possible discipline might be. Hawley replied that he would seek to set up a meeting for Friday after school, and that the issue was "related to the unprofessional manner in which he has treated Susan." Cupery responded that when a grievance representative was threatened with discipline under such circumstances "it is and will be a big deal."

46. Hawley, Bechard, Cupery and Hanser met to discuss the e-mail exchange between Bechard and Hanser. No disciplinary action of any type resulted from the meeting.

47. The polling of staff members regarding the scheduling of Spring parent teacher conferences in 2004 was consistent with the terms of the 1999-2001 collective bargaining agreement and did not constitute an attempt at individual bargaining.

48. The scheduling of Spring parent teacher conferences in 2004 on terms different than those contained in the negotiated calendar without the agreement of the Association directly contradicted the terms of the 1999-2001 collective bargaining agreement and constituted a unilateral change in the wages, hours and conditions of employment for elementary teachers.

49. None of the individual interactions between Bechard and Zarske regarding Zarske's professional activities in the 2003-2004 school year or the Fall semester of the 2004-2005 school year had a reasonable tendency to interfere with the exercise of protected rights.

50. The volume of interactions between Bechard and Zarske regarding Zarske's professional activities in the 2003-2004 school year and the Fall semester of the 2004-2005 school year did not have a reasonable tendency to interfere with the exercise of protected rights.

51. Randy Hawley's e-mail to Joe Hanser advising him that he had the right to be accompanied by a Union representative to a meeting with Hawley, as discipline might result from the meeting, did not have a reasonable tendency to interfere with, coerce or restrain Hanser in the exercise of his protected rights.

52. Randy Hawley's comment to Diane Lazewski that the Association had the right to use someone other than Cupery to represent them did not have a reasonable tendency to interfere with the exercise of protected rights, nor did it interfere with the Association's right to bargain through representatives of its own choosing.

53. Randy Hawley's comment to Diane Lazewski that the Board would not negotiate with the Association until the arbitration over the prior collective bargaining agreement was

resolved was neither a promise of a benefit, nor a threat of reprisal, and did not have a reasonable tendency to interfere with the exercise of protected rights. Neither did it interfere with the Association's right to bargain through representatives of its own choosing.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the Complainant, New Berlin Education Association, is a labor organization within the meaning of Section 111.70(1)(h), MERA.

2. That the Respondent, School District of New Berlin, is a municipal employer, within the meaning of Section 111.70(1)(j), MERA.

3. That Rose Zarske and Joe Hanser are municipal employees, within the meaning of Section 111.70(1)(i), MERA.

4. That by the conduct described in the above Findings of Fact Nos. 3 through 20, the Respondent municipal employer did not engage in individual bargaining.

5. That by the conduct described in the above Findings of Fact Nos. 3 through 20, the Respondent municipal employer unilaterally changed status quo regarding the hours and working conditions of teachers, and thereby committed prohibited practices within the meaning of Section 111.70(3)(a), MERA.

6. That by the conduct described in the above Findings of Fact Nos. 21 through 45, the Respondent municipal employer did not commit prohibited practices within the meaning of Section 111.70(3)(a), MERA.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

It is ORDERED that: the Respondent School District of New Berlin shall immediately

1. Cease and desist from unilaterally changing the status quo ante with respect to the scheduling of parent-teacher conferences and the prerequisites for the implementation of contract waivers.

2. Take the following affirmative actions which will effectuate the purposes of the Act:

- a. Pay 1.25 hours of pay at the then-existing per diem rate to all teachers who participated in the Spring parent-teacher conferences in 2004.
- b. Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order of the steps taken to comply herewith.

As to all other allegations of prohibited practices set forth in the complaint, the complaint is dismissed.

Dated at Racine, Wisconsin, this 23rd day of November, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/

Daniel J. Nielsen, Examiner

SCHOOL DISTRICT OF NEW BERLIN

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

There are three aspects to the complaint. The first is whether the District engaged in individual bargaining by seeking to amend the schedule for parent-teacher conferences in the Spring of 2004. The second is whether, as a result of that scheduling dispute, Principal Susan Bechard and other District personnel engaged in retaliation against Building Representative Rose Zarske and grievance chair Joe Hanser. Finally, the Association alleges that District Human Resources Director Randy Hawley attempted to interfere with the Association's choice of bargaining representative by suggesting that Steve Cupery need not be used in that role. Each is addressed in turn.

The Parent-Teacher Conference Waiver

The expired collective bargaining agreement has a provision for site based decision making, which allows the faculty and administration at a school to execute waivers of the labor contract. The waiver must be in writing, and is effective only if it is "approved by (a) a building principal, (b) a vote of 67% of the total teaching staff in that building at the time of the vote and (3) by the Association." In the Fall of 2003, the faculty at Prospect Hill and Principal Susan Bechard agreed to a waiver for parent-teacher conferences, allowing them to be held on a schedule different than that called for by the contract. The waiver was approved by the Association as well. As a result of the different schedule, teachers put in 12.75 hours on the conference nights, rather than the 14 hours they would normally be scheduled, even though they still received 14 hours off on compensatory days in that semester.

The dispute here arose in the second semester, when the administration attempted to get the teachers to make up the hour and fifteen minutes by scheduling longer sessions for the Spring parent-teacher conferences. The Association refused to approve any waiver for the second semester that called for more than seven hours of work time. Bechard persisted, putting the matter to several votes among the faculty, over the Association's objections, until a supermajority approved a proposal for a different set of days, with the number of hours left undecided. She then announced that the teachers would be expected to work 8.25 hours across the two days set for conferences, although she did not monitor the teachers to be sure they all worked the full 8.25 hours.

The Association argues that Bechard's persistence in pursuing the waiver and the additional hours in the second semester amounts to an attempt at individual bargaining, and that her ultimate scheduling of conferences without any Association approval of a waiver is a violation of the expired agreement, and thus a change in the status quo ante. For its part, the District asserts that the Association acted in bad faith by agreeing to the Fall waiver with fewer work hours but the usual amount of comp time, then refusing to balance out the hours

in the Spring. The District asserts that in prior years, waivers were executed separately for each semester, but always totaled twenty one hours of work across the year, and that this establishes the status quo for parent teacher conferences.

The District's pursuit of a waiver for the second semester, over the objections of the Association, cannot be fairly termed an effort at individual bargaining. The expired contract establishes a system for arriving at waivers, and that system assumes the effort is initiated at the school level between the faculty and the principal. It is silent as to the precise procedures for initiating a waiver, but it certainly contemplates some measure of direct dealing between the faculty and the principal. The overall safety valve for the Association's status as the exclusive bargaining representative lies in the requirement that a waiver agreed at the school level must still be approved by the Association.

While there is no evidence of individual bargaining, it is clear that the implementation of the locally agreed schedule for conferences, and Bechard's insistence on 8.25 hours of work for the Spring conferences, without the Association's approval, is a violation of the expired agreement and thus a unilateral change in the status quo ante. The District's appeals to equity and to past waivers cannot be held to be valid, as they are contradicted by the express terms of Article X itself. The provision speaks directly to the effect of a waiver as a precedent for the future:

... A waiver shall not constitute past practice or establish precedent for future bargaining, for grievance processing or for any other purpose.

The District may have relied upon the pattern of past waivers when it executed the Fall semester waiver, and its expectation that a second semester waiver would be forthcoming may have been understandable. However, given the clear language of the contract, the Association was not obligated to execute a second waiver. If the District wanted to insure that the work hours across the two semesters would total twenty-one hours, its recourse was to negotiate a single waiver for the year, or otherwise secure a written commitment to that effect. Having failed to do so, it was not entitled to resort to self-help.

The District also notes that Bechard did not police the hours worked by the teachers in the second semester, and suggests that there have been no damages suffered because teachers may well have worked less than 8.25 hours. That argument, while ingenious, is not persuasive. Bechard directed the teachers to work 8.25 hours. She did so knowing that the Association approval of her desired waiver was not forthcoming, and that the status quo under the expired Agreement required only seven hours of work. The conferences proceeded on the schedule she set. Absent any evidence whatsoever that teachers ignored her orders, the presumption must be that the hours demanded were the hours worked. The Association is not required to have every teacher testify that they followed Bechard's orders as a pre-condition to receiving a meaningful remedy. I have therefore directed the District to pay all affected teachers at Prospect Hill 1.25 hours of pay at their per diem rate for the additional time worked in the Spring of 2004. Given the limited nature of the violation – amounting to a

contract violation - I do not find that the posting of a public notice is necessary to effectuate the purposes of the Act.

Retaliation Against Rose Zarske

The Association asserts that Bechard engaged in a campaign of harassment against Rose Zarske, as a means of retaliating against her for not supporting the waiver for Spring conferences. Bechard did not impose discipline against Zarske, or take directly adverse action against her, but had a series of communications with her, including (1) asking her to stop talking during a presentation at a staff meeting; (2) reminding her to take walkie-talkies and epi-pens with her when she took her students outside; (3) asking her to submit her grades for the quarter, when Zarske believed she had already done so; (4) questioning the amount of extras she was scheduling for her first graders; (5) having her cancel a planned field trip; (6) questioning her about the possible religious overtones of some Halloween decorations in her classroom; (7) questioning why she was teaching maps to second graders, when that was part of the fourth grade curriculum; (8) asking her to devote more time to reading and writing instruction; (9) asking her what procedure she had followed to arrange a substitute teacher; (10) having some surplus chairs removed from Zarske's classroom after Zarske had placed them there; (11) telling Zarske she should secure Clorox wipes for use in her classroom. The Association concedes that any one of these actions and communications might be explicable as a normal interaction between teacher and principal, but argues that the sheer volume of negative interactions is highly suggestive of retaliation.

Certainly it is possible to retaliate against an individual without using the blunt instrument of discipline to accomplish the goal. Subtle retaliation is no less illegal than direct retaliation. However, looking at the totality of the interactions between Zarske and Bechard, it is difficult to make out a pattern of hostility or retaliation. Each of these communications has a negative overtone, but each also has a legitimate explanation, and one would expect a great deal of contact between a principal and a teacher in a school with a relatively small faculty. At the same time Bechard was supposedly retaliating against Zarske, she was giving her a glowing performance evaluation, and assigning her to responsible positions on hiring and planning committees. It may be that the personal relationship between the two was strained in the wake of the controversy over the parent-teacher conferences, and Zarske's sensitivity to negative contacts during that time would understandably be heightened. However, her protection as an Association Building Representative does not prevent her supervisor from supervising her, and does not guarantee that their every contact will be upbeat and enjoyable. There is no tangible action that can be identified as retaliation, and each of these contacts between Zarske and Bechard had a legitimate basis in the demands of an ongoing supervisor-employee relationship. The substantive actions taken by Bechard towards Zarske have been inconsistent with retaliation. I therefore conclude that the evidence will not permit a finding that Bechard's conduct would have had a chilling effect on a reasonable person's exercise of protected rights.

Retaliation Against Joe Hanser

The Association asserts that Human Resources Director Randy Hawley attempted to coerce and retaliate against grievance chair Joe Hanser for his efforts to represent Zarske, by threatening discipline against him. The threat took place when Hawley advised Hanser that he had the right to be accompanied by an Association representative to a meeting about his e-mail exchanges with Bechard, because discipline could result from the meeting. No discipline did result, and the question is whether advising an Association activist of his right to representation because discipline is a possibility is, in and of itself, an act of interference.

Almost by definition, advising a person that discipline is a possible result of a meeting can reasonably be seen as a threat of discipline. Where the object of the threat is a Union official, and the basis for the threatened discipline is his activities in the role of Union official, it is foreseeable that he and others may thereby be chilled in the exercise of protected rights. Thus discipline in those circumstances is subject to a high degree of scrutiny.¹

Here, there is no question that the threat of discipline arose from Hanser's role as the grievance chair. He was responding to Bechard's e-mail chastising Zarske, and stating his view of events surrounding his discussion with Bechard. There is also, however, a legitimate Employer interest in protecting its supervisors from ad hominen insults and attacks on their integrity. Hawley was at least entitled to investigate the facts underlying the nasty e-mail exchange, to determine whether Hanser's insulting characterizations of Bechard went beyond the normal rough and tumble of labor-management sparring. "In such a direct clash between statutory rights and an employer's *bona fide* interests, the Commission's traditional balancing test comes into play. That is, what are the nature and weight of" .." [the employee's] "... statutory interests, does the .." [Employer] "... have genuine countervailing operational needs, and are those needs being met in a manner that interferes as little as practical with .." [the] "... protected activity?" DEPARTMENT OF CORRECTIONS, DEC. NO. 30340-B (WERC, 7/20/04), at page 17.

Applying this balance to these facts, it is clear that the District did not cross the line into statutory interference. Hanser's statutory interest in representing Zarske is evident, and his exchange of e-mails with Bechard was an extension of the representation. It was aimed at establishing his version of the facts, which was more favorable to Zarske than Bechard's. The District's interest in protecting its supervisors from abuse and insubordination is also evident. The robust give and take that typifies union-management relations does not make supervisors fair game for any and every type of invective and accusation. The action taken – scheduling a meeting to discuss the matter and advising Hanser that he had the right to Union representation at that meeting – pursues the rights of management with relatively little interference with

¹ See DEPARTMENT OF CORRECTIONS, DEC. NO. 30340-A (Nielsen, 8/15/03), at page 29.

Hanser's rights. Hanser might well have been uneasy about Hawley's intentions, and the notice that he should bring a Union representative may have seemed to him to be shot across the bow. Hanser was an experienced grievance chair, and knew or should have known that an employee going into a meeting to discuss why he had thrice gone out of his way to call a principal a liar would do well to have a Union representative present. This might be a very different case if discipline had actually ensued, but on the facts as they unfolded, Hawley's mere giving of notice of the right to Union representation does not have a reasonable tendency to chill the exercise of protected rights.

Randy Hawley's Comment Regarding Steve Cupery's Role

Finally, the Association alleges that Randy Hawley attempted to interfere in its choice of bargaining representatives through had a conversation he had with Association Vice President Diane Lazewski in late April. As described by Lazewski, in the course of the conversation, Hawley blamed Steve Cupery for the difficulties in the District's labor relations, noting in particular Cupery's filing what Hawley believed were many meritless grievances and his extreme unpopularity with the members of the School Board. He told Lazewski that the Association did not need to use Cupery and could have him replaced. Hawley denies that, and says that what he discussed was a cooperative form of interest based bargaining, where the parties dealt directly with one another, without their professional representatives being present. While that is not an impossible scenario, I am persuaded that it is less likely than the version contained in Lazewski's e-mail several days after the discussion. She would have to have completely misunderstood Hawley, believing that he was personalizing the description of the process, to suggest that teachers in other districts had dumped Cupery, as opposed to having opted for a process that lessened reliance on professional negotiators.

The discussion between Hawley and Lazewski to that point does not raise any question of a prohibited practice. Complaining about the other side's representative and suggesting that he or she is the problem in a labor-management relationship is a commonplace occurrence. Unions seek to publicize the bills submitted by management-side law firms in order to bring pressure on public employers.² Parties make comments to newspapers about the intransigence of the other side's spokesperson. Personalizing disputes in this way may be a questionable strategy and it may be unfair, but it is easily within the acceptable bounds of the struggle surrounding public sector collective bargaining. Here, however, Lazewski claimed in her e-mail and in her testimony that Hawley went past criticism, and linked the Board's unwillingness to open negotiations over the next contract to Cupery's having tied them up in litigation. Lazewski claimed that he specifically tied opening negotiations to the settlement of an arbitration. The implication is that the Board would punish the teachers for allowing Cupery to aggressively administer the contract, but would reward them if they forfeited the grievance. Hawley disputes this point as well, and I

² See MARQUETTE COUNTY, DEC. No. 31257-A (Gratz, 10/03/05) at pages 26-27.

believe that his version of this portion of the conversation is the more plausible. He essentially conceded a comment along those lines, but said that he was referring to the interest arbitration over the predecessor contract. No one identified what pending grievance arbitration might have been the object of Hawley's wrath, and a link between a specific grievance case and the opening of negotiations does not make all that much sense. On the other hand, it makes perfect sense to suggest that a party might be reluctant to open negotiations over a new contract when the outcome of the arbitration over the prior contract was not yet known. The two are directly related, and there is nothing improper about stating the obvious linkage between them.

Dated at Racine, Wisconsin, this 23rd day of November, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/

Daniel J. Nielsen, Examiner

